UK Government Consultation on the United Nations Convention on International Settlement Agreements Resulting From Mediation (New York, 2018) (the "Singapore Convention on Mediation")
(April 2022)

This response is provided by a working group of the Centre for Commercial Law at the University of Aberdeen. The working group consists of Professor Margaret Ross, Dr Burcu Yüksel Ripley, Dr Patricia Zivkovic, Mr Baffour Yiadom-Boakye, Mr Ilias Kazeem, Ms Konstantina Kalaitsoglou, and Ms Hikari Saito.

Q1: Do you consider that this is the right time for the UK to become a Party to the Convention (i.e. to sign and ratify as set out in 2.10 above)?

The Convention has been signed by 55 countries and ratified by 9 of them. These are promising numbers given that the Convention was adopted in December 2018 and some of these countries are UK's important trading partners. Therefore, there are advantages for the UK to become a party to the Convention at early stages. As is the case with other UNCITRAL Conventions, there would be issues of uniform interpretation and application of the Convention given that there is no court or body to give an authoritative uniform interpretation on the provisions of the Convention. The UK, if it becomes party to the Convention, could also contribute to the development of a uniform interpretation of the Convention via judgments given on the Convention by the courts in the UK.

On the other hand, a concern can be raised about whether it is the right time for the UK to become a party to the Convention as there are some serious issues with some of the provisions of the Singapore Convention which are elaborated in our answers to the following questions.

Q2: What impact do you think becoming Party to the Convention will have for UK mediation and mediators?

Mediation is raising as a popular dispute resolution mechanism for commercial disputes and becoming a party to the Convention could help to strengthen the UK's position as an international dispute resolution centre. There would be a need for training to be provided to mediators on the Convention.

On the other hand, becoming a party to the Convention may eventually result in that mediation practice may shift to more quasi-arbitration proceedings. As a settlement agreement becomes an enforceable title under the Singapore Convention, the parties would expect the settlement agreement to be aligned with legal evaluation. This concern is expressed in Bryan Clark and Tania Sourdin, 'The Singapore Convention: a solution in search of a problem?' (2020) 71(3) Northern Ireland Legal Quarterly 481, 493.

Q3: What impact do you consider the Singapore Convention would have on the UK mediation sector and particularly on the enforceability of settlement agreements?

Recognition and enforcement is the most important stage in dispute resolution and it is usually very costly and time-consuming in cross-border contexts. Having an international legal framework, like the Singapore Convention, facilitating this stage for mediation could significantly help to reduce cost and time for recognition and enforcement of settlement agreements.

[Comment redacted]

Q4: What impact do you think becoming Party to the Convention might have on other forms of dispute resolution?

The Alternative Dispute Resolution (ADR) industry has had an undeniable growth in the past years. According to a leading market survey conducted by White & Case LLP and Queen Mary University in 2021, there is a strong preference for international arbitration combined with other forms of ADR (59% of the respondents, see https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/). A hybrid ADR, which is usually synonymous to mediation and arbitration, is a dispute resolution mechanism that can be useful for commercial disputes.

Whilst the procedural aspects of arbitration are fairly settled – at least in the international arena, mediation lacks an international convention that underpins its operation and especially the enforcement of mediated settlement agreements. The Singapore Convention purports to provide this legislative framework. It is noted that the institutions that traditionally administer only arbitration are now administering and promoting mediation as well. Such institutions also make rules for the conduct of mediation to help structure the mediation process, eg the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) both of which have developed mediation rules. This development means that the institutions have recognised the need to provide parties with options to choose from ADR mechanisms.

We think that the adoption of the Convention is unlikely to negatively impact arbitration and other ADR mechanisms. Becoming a party to the Convention can facilitate mediation to complement other forms of dispute resolution, especially litigation and arbitration. It can also promote the use of mediation as another dispute resolution mechanism for international commercial disputes, in a way similar to the impact of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on arbitration. There will be uniformity and ease in the enforcement of international commercial settlement agreements through mediation. Although mediation settlement agreements concluded in the UK can still be enforceable in a Singapore Convention contracting state even if the UK does not become a party to the Convention, the existence of an enforcement regime under the Convention, to which the UK becomes party, can impact positively on the perception of commercial parties regarding the use of mediation and help to build trust in this form of dispute resolution.

Until now, arbitration appears to have overshadowed mediation in a way that much attention may not always be paid to mediation even by the dispute resolution professionals. Describing this problem as a “tool bias”, the President of the ICC Court, Ms Claudia Salomon, argued in

her keynote speech at the Tel Aviv Arbitration Week that the "magnetic pull" of international arbitration implies lack of due attention to other useful methods of dispute resolution in the toolbox of the professionals (see https://www.iccwbo.be/avoid-arbitration-express-train-urges-icc-court-president/).

English case law has been emphatic on the need for parties to explore all methods of dispute resolution in the order of stipulations in the contract of the parties (see *Ohpen Operations UK Limited v Invesco Fund Managers Limited [2019] EWHC 2246 (TCC); see also Holloway v Chancery Mead Ltd [2008] EWHC 2495 (TCC) and Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059*). If the UK becomes a party to the Convention, we think that it will help to promote mediation without taking anything away from other dispute resolution mechanisms.

Q6: What might be the downsides of the UK becoming Party to the Convention?

[Comment redacted]

Another shortcoming might be that there is no equivalent of an arbitral seat under the Singapore Convention. Instead, the only attachment of the mediation and the settlement agreement to domestic systems is the law of the mediation and the law where the settlement agreement purports to be enforced. Whilst this is convenient for purely online mediations, there is some scope for tactical proceedings by parties who purport to enforce the mediation settlement agreement. For example, a party whose mediation settlement agreement has not been enforced in a certain jurisdiction is free to initiate enforcement in other multiple jurisdictions where the other party holds assets. There is no intrinsic mechanism in the Convention to stop these proceedings from being conducted in parallel. Of course, this argument has the caveat that mediation settlement agreements are entered into freely and on the basis of consensus, thus it will be the minority of cases where parties will seek judicial help for enforcement.

Q7: Are there any specific provisions which cause concern or that may adversely affect the mediation sector in the UK? For example, the broad definition of mediation in the Convention's text?

We note the concerns re Article 5 expressed in our answers to Qs4 and 10, [comment redacted].

[Comment redacted]

Beyond those concerns above, we don't think that there are specific provisions that would adversely affect the mediation community in the UK and that there are probably enough safeguards to allow the court to consider a challenge in the enforcement arena. To not insist on reciprocity is more consistent with the ethos of mediation than it is with norms of private international law in other areas of process. The definition of mediation strikes the best balance possible if the Convention is to have any value or impact, and it excludes the court-annexed, family focussed processes where the parties are less autonomous in their negotiating powers in mediation.

Q8: The Convention states that a settlement agreement must be concluded “in writing” and that this requirement will be met if it is recorded ‘in any form’. Do you envisage any difficulties for the enforcement of settlement agreements under the Convention given the broad definition of “in writing”?

We don’t see any particular problem with "in writing" being defined as it is.

During the negotiations of the Convention, Article 9(2) of the United Nations Convention on the Use of Electronic Communication in International Contracts was referred to in discussing the requirement of “in writing” (see A/CN.9/867 para 133; A/CN.9/896 para 66). Therefore, exchange of emails should be sufficient to prove “in writing” under the Convention. By contrast, during the negotiations of the Convention, there were extensive discussions as to whether a settlement agreement should be in ‘a single document’ or ‘a complete set of documents’ (see A/CN.9/867 para 134), but the Working Group agreed not to include this requirement to the final text of the Convention and to allow the competent authority to require the parties to submit necessary documents.

We note that the law of Evidence in Scotland (and in other parts of the UK) has long been permissive of electronic means of putting things into writing, which could include video or diary notes, but for even longer to varied forms of writing such as rough notes, or scribbles on any available material. The party seeking to rely on the Convention will have to prove that there was a mediated outcome and what its terms were. It will be in all interests in mediation to ensure it is recorded clearly. There has been little, if any, comment in Scottish litigation about lack of clarity in a mediated settlement.

Q9: What types of “other” evidence should a Competent Authority consider as acceptable evidence of settlement agreements in the absence of the proof specified in Article 4.1.b (i)-(iii) of the Convention?

Courts could accept parole (verbal) evidence to explain or tease out what has been put into writing. The courts in Scotland and England have become increasingly willing to accept this in order that they can understand what the parties meant in the writing. However that does generate litigation in contract law at present, and the more that is needed to be proved in enforcement proceedings the less they become typical of the short focussed form of enforcement orders underpinned by Convention.

Q10: Article 5.1(e) of the Convention states that enforcement may be refused if “There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement”. Do you have any comments on which ‘standards’ may be applicable?

The drafters of the Convention acknowledged that competent authority may decide the applicable standards, for example, the law governing mediation and codes of conduct, including those developed by professional associations (see A/CN.9/901 para 87; A/CN.9/929 para 96).

As we know the published "standards" in different countries vary (if any exist at all) and mediation is not as such a professionally regulated service, albeit that many mediators have co-existing professional qualifications. As noted in the Consultation paper, there are different cultural norms in the practice of mediation across the world. Assuming that a country cannot apply a domestic or Model Law standard alongside the Convention, it may be that the assessment of standards has to emerge from operation of the Convention and the interpretation of this Article 5.1 (e) into a recognised jurisprudence. We realise that for some people that lack of clarity would feel too risky and act as an obstacle to their willingness for the UK to ratify the Convention.

Q11: The Convention provides that each Contracting Party to the Convention shall enforce a settlement agreement. What types of provision is usually included in settlement agreements that may need to be enforced? I.e. will the Competent Authority need particular powers to cover these provisions?

Settlement agreements could cover provisions for both monetary and non-monetary obligations. During the negotiations of the Convention, the delegations from common law jurisdictions wanted to limit the scope of provisions to monetary obligations but it was suggested that the Convention should follow the same policy that the New York Convention follows for the enforcement of foreign arbitral awards, which covers both monetary and non-monetary obligations (see A/CN.9/822 para 40). There was no agreement at the later stage of the negotiations on this point. We therefore think that a competent authority would enforce mediated settlement agreements to the extent that its domestic procedural law allows.

Q12: What are your views on the provisions of the Convention meaning that:
a) If the UK were to become Party to the Convention, it would be expected to enforce settlement agreements of both contracting and non-contracting parties?
b) If the UK were not to become Party to the Convention, UK mediated settlement agreements could still be enforced in a country which is a party to the Convention?

Yes to both questions. There is no reciprocity requirement under the Singapore Convention. It can be read from the phrases, for example 'At least two parties to the settlement agreement have their places of business in different States' under Article 1.1 (a), indicating that those states are not required to be contracting states. Moreover, there is no concept of place of mediation under the Singapore Convention. Therefore, the UK mediated settlement agreements could be enforced in a country which is a party to the Convention, even though the UK were not to become party to the Convention.

Q13: The Government will consider whether the UK should make either reservation under Article 8 should it ratify the Convention, namely:
a) "it shall not apply this convention to settlement agreements to which it is a party or to which any governmental agencies or any person acting on behalf of a governmental agency is a party"; and/or
b) "It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention"
What are your views on this?

We think that it would be appropriate to make a reservation in respect of agreements involving public bodies.

Some arguments may also be raised in favour of the second reservation that the Singapore Convention should only apply where the parties to the Settlement Agreement:

- It may promote party autonomy which is central to mediation as an ADR mechanism. It may also help to eliminate the possibility of creating access to enforcement of agreements where the parties never contemplated enforcement like court judgments. If the parties choose the application of the Convention, it would mean that they have contemplated enforcement via the Convention (and the consequences of their mediated settlement agreement being subject to direct cross-border enforceability) and are happy with it.

- It may be commercially sensible and consistent with the jurisprudence of the English court on the general restraint from interfering with commercial agreements where the parties are not usually sophisticated and they are not considered to be of unequal bargaining powers (see *Photo Production Ltd. v Securicor Transport Ltd.* [1980] *and Mannai Investment Co. Ltd v Eagle Star Life Ass. Co. Ltd [1997]*). In a similar manner, the Convention already excludes certain types of disputes from its scope of application where bargaining powers are usually unequal (family disputes, inheritance and consumer disputes etc, see Article 3 of the Convention).

- Any factor which defeats the foregoing assumption about the mediation process or the settlement agreement will potentially fall under any of the grounds for refusal of enforcement stipulated in Article 5 of the Convention.

- Article 7 of the Convention shows that the Convention does not affect any right that an interested party may avail itself under the relevant law concerning the settlement agreement. The Convention is therefore complimentary to such rights rather than abrogating them. This implies that interested parties may be able to articulate such other rights in respect of the settlement agreement.

Q14: Do legal practitioners consider that there could still be confusion or uncertainty about when the Singapore Convention may apply? I.e., Could a disputing party seek to invoke the Convention if, during the course of arbitral proceedings, a mediation resolves the matter at hand without an arbitral award being handed down?

We note that there are different views that exist on this matter. One view is that the Convention may not fully support hybrid dispute resolution mechanisms where settlement has been combined with or conducted concurrently with adversarial mechanisms like arbitration or litigation. It is argued that it will be a convoluted approach that may not be commercially or logistically viable (see http://arbitrationblog.kluwerarbitration.com/2019/08/31/is-singapore-convention-to-mediation-what-new-york-convention-is-to-arbitration/). Another view maintains that the position of the Convention on this matter is justified by the point that settlement agreements

involving litigation or arbitration will be covered by enforcement of judgments and enforcement of arbitral awards respectively (see https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/the-singapore-convention-on-mediation).This view seems to align with Articles 1(3)(a)(ii) and 1(3)(b) of the Convention. It also seems to align with the wording of Article 1(3)(a)(i) of the Convention which stipulates that the Convention is not applicable to settlements agreements which have been '*approved by a court*'. However, the portion of Article 1(3)(a)(i) of the Convention which excludes settlement agreements *'concluded in the course of the proceedings before a court'* may lead to ambiguities as the level of the court's involvement/participation that is expected under this provision is not entirely clear.

As for arbitration, we think that the position seems clearer as the Convention does not apply to settlement agreements that have been recorded and are enforceable as an arbitral award. Once a settlement agreement has not been recorded and is not enforceable as an arbitral award, then the Convention should apply even if the settlement agreement was reached through mediation during arbitral proceedings. However, where parties seek to enforce a mediated settlement agreement and have dissolved or plan to dissolve the arbitral tribunal, the following observations might be relevant:

a. Tribunal decisions that are not classed as final arbitral awards such as, interim awards, emergency awards, procedural orders and directions will have a questionable fate if parties seek to enforce the mediated settlement agreement and dissolve the tribunal without rendering an award.
b. Parallel proceedings might occur if one of the parties, after entering the mediated settlement agreement, seeks to enforce any partial or interim award rendered prior to the commencement of mediation under the New York Convention whilst the other to enforce the mediated settlement agreement under the Singapore Convention.

A clear-cut procedure could be necessary to establish how parties are to operate the arb-med and arb-med-arb schemes to avoid confusion over which Convention applies when.

Q15: Do you consider that a lack of regulation and the potential differences in conduct and standards amongst Parties to the Convention present any particular challenges to the application of the Convention in the UK?

Please see our comments on this in our answer to Q10.

Although the lack of regulation and potential difference in conduct and standards amongst parties to the Convention could potentially present some challenges to the application of the Convention in the UK, we note that Article 4 of the Convention contains elaborate requirements that a party relying on a settlement agreement must furnish to the competent authority in the UK. Also, Article 5 of the Convention provides grounds for refusing to grant relief. The competent authority in the UK may refuse to grant relief where a party furnishes information on matters relating to Article 5(1)(a-f) or the competent authority may refuse to grant relief on its own accord in matters relating to Article 5(2)(a-b). Articles 4 and 5 of the

Convention enable the competent authority in the UK to examine if appropriate conduct and standards have been met.

Q16: What impact do you consider the Singapore Convention would have on the UK mediation sector and particularly on the enforceability of settlement agreements?

Please see our comments in our answer to Q3.

Q19: What are your opinions on the practical benefits of the Singapore Convention providing for direct enforceability or in respect of the benefits of the wider grounds than in the existing common law?

Please see our comments in our answer to Q1.

We also note the enforcement mechanism under the Singapore Mediation Act 2017 (available at https://sso.agc.gov.sg/Act/MA2017) as an example for consideration regarding the benefits of providing enforceability to a mediated settlement agreement, which is broader than the Mediated Settlement Enforcement Order under the Civil Procedure Rules 78.24.

Q20: Who do you consider to be the appropriate Competent Authority for a Party to the Convention to lodge an application or claim with, in order to enforce a mediated settlement agreement (e.g. the County Court, High Court, Court of Session)?

The same process of specific shortened application as apply to other Convention enforcement claims could apply to this Convention, but it would need to all for more potential factual dispute about the mediation and its enforceability than is normally the case in other matters.

Q21: Would the implementation of the Convention require any procedural changes to the Court system of England and Wales, Northern Ireland or Scotland to enable its effect operation?

Please see our comments in our answer to Q20.

Q22: As mediation practice and legislation are well established in the UK, the government does not intend to use the Model Law provisions to implement the Singapore Convention. Do you have any views on this or on whether the UK should in fact apply the Model Law instead of ratifying the Convention?

If the UK decides to become a party to the Convention, we would agree that there is probably no need for the Government to use the Model Law provisions to implement the Convention. The Model law on international mediation does not have a wide acceptance as the Model Law on international commercial arbitration. Few countries have enacted mediation legislation based on the Model Law as compared to the Model Law on arbitration. The Convention can be ratified in the UK without the use of the Model Law. We agree that the current legislation and practice in the UK which govern mediation may suffice.

Alternatively, since there is no specific legislation on mediation that applies in the case of the Arbitration Act 1996 or the Scottish Arbitration Act, the UK may adopt the Model Law to serve this purpose. However, we don't think that the Model Law should be used in place of ratifying the Singapore Convention. It could be rather used in addition to ratifying the Convention since the Model Law and the Convention have different purposes. The Model Law serves as a model instrument for states for enacting domestic legislation to govern the mediation of international commercial disputes. The Convention, on the other hand, is an international treaty governing the mediation of international commercial disputes.

On the other hand, if the UK decides not to join the Singapore Convention, it would be useful for the UK to consider the implementation of the Model Law with some amendments. Although mediation practice is well developed in the UK, it is essential to protect confidentiality and core principles of mediation which reflect norms and standards of mediation and mediators (as discussed in our comments to Qs 10 and 12 at the statutory level). Together with enforceability of mediated settlement agreements, various provisions of the Model Law are worth considering for further development of mediation in the UK.